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No. 92-311

In the Supreme Court of the United States

OCTOBER TERM, 1992

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

RICHARD H. SCHAEFER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

In this action for judicial review of the denial of a claim for Social Security disability benefits, the district court, in accordance with sentence four of 42 U.S.C. 405(g), reversed the Secretary's decision and remanded for further proceedings. The question presented is:

Whether, in light of *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), and *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157 (1991), the court of appeals correctly held that the district court's remand order was not a "final judgment" that triggered the 30-day period for filing an application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

PARTIES TO THE PROCEEDING

Petitioner, the defendant below, is Louis W. Sullivan, the Secretary of Health and Human Services. Respondent, the plaintiff below, is Richard H. Schaefer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 960 F.2d 1053 (Table). The prior opinion of the court of appeals in *Welter* v. *Sullivan* (Pet. App. 3a-8a), on which the court relied in this case, is reported at 941 F.2d 674. The opinions of the district court and reports of the magistrate (Pet. App. 9a-12a, 13a-25a, 26a-27a, 28a-41a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1992. On July 16, 1992, Justice Blackmun

extended the time within which to file a petition for a writ of certiorari to and including August 15, 1992 (a Saturday). The petition was filed on August 17, 1992 (a Monday) and was granted on November 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides:[1]

> [1] Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. [2] Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. [3] As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. [4] The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or

[1] Because of the length of 42 U.S.C. 405(g), we have inserted numbers in brackets to identify its separate sentences.

> without remanding the cause for a rehearing. [5] The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. [6] The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. [7] Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. [8]

The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. [9] Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

2. The Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, provides in relevant part:

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action * * * brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought * * * . The party shall also allege that the position of the United States was not substantially justified. * * *

* * * * *

(2) For purposes of this subsection—

* * * * *

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

* * * * *

STATEMENT

This case involves the timeliness of an application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), in an action for judicial review of the denial by the Secretary of Health and Human Services of a claim for Social Security benefits. Under EAJA, a fee application must be filed "within thirty days of final judgment in the action." 28 U.S.C. 2412(d)(1)(B). EAJA defines the term "final judgment" to mean "a judgment that is final and not appealable." 28 U.S.C. 2412(d)(2)(G). The specific question presented here is when the 30-day period for filing an EAJA fee application commences in a case in which the district court reverses the Secretary's decision and remands the cause to the Secretary for further proceedings pursuant to sentence four of 42 U.S.C. 405(g). Sentence four provides that the district court "shall have the power to enter, upon the pleadings and transcript of [the] record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing."

1. In June 1986, respondent filed an application for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.* His application was denied at all levels of the administrative appeals process, and he then sought judicial review

pursuant to 42 U.S.C. 405(g). By order entered April 4, 1989, the district court "reversed" the Secretary's decision and remanded the case to the Secretary for further consideration in light of the court's order. Pet. App. 26a-27a; see also *id.* at 28a-41a (magistrate's recommendation).[2] The Secretary did not appeal that order. The district court's docket sheet states that the case was then closed.

Following the remand, the ALJ, in a decision dated January 31, 1990, found respondent disabled. That decision became final 60 days later, when the time for review by the Appeals Council expired. Pet. App. 10a; see 20 C.F.R. 404.984.

2. On July 18, 1990, respondent filed an application in the district court for attorney's fees under EAJA.[3] The district court disposed of that motion on August 26, 1991, after this Court rendered its decision in *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157 (1991). In *Melkonyan*, the Court stated that in cases remanded to the Secretary pursuant to sentence four of 42 U.S.C. 405(g), the 30-day filing period under EAJA "begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no

[2] The district court concluded that the administrative law judge (ALJ) failed to evaluate respondent's subjective complaints of pain in accordance with Eighth Circuit precedent, that the ALJ did not properly analyze respondent's back injuries, and that the ALJ's assessment of respondent's residual functional capacity to engage in his past work was not supported by the medical evidence in the record as a whole. Pet. App. 26a-27a.

[3] The district court's opinion erroneously states that the fee application was filed on July 17, 1990.

longer appealable." 111 S. Ct. at 2165. In light of *Melkonyan*, the Secretary argued that the "final judgment" for purposes of EAJA was the district court's order of April 4, 1989, which reversed the Secretary's decision denying benefits and remanded to the Secretary for further proceedings. That order became "not appealable," 28 U.S.C. 2412(d)(2)(G), on June 3, 1989, upon expiration of the 60-day period allowed by Fed. R. App. P. 4(a)(1) for taking an appeal. Consequently, the Secretary argued, respondent's EAJA application was untimely because it was not filed within 30 days of June 3 (*i.e.*, by July 3, 1989), as required by 28 U.S.C. 2412(d)(1)(B), but instead was filed more than one year later (on July 18, 1990). Pet. App. 10a-12a.

The district court rejected the Secretary's argument and held that respondent's fee application was timely. It found the timeliness issue in this case to be controlled by the Eighth Circuit's post-*Melkonyan* decision in *Welter* v. *Sullivan*, 941 F.2d 674 (8th Cir. 1991) (*reproduced at* Pet. App. 3a-8a), which had been decided only 17 days earlier. *Welter* involved consolidated cases in which the district court had ordered remands to the Secretary pursuant to sentence four of 42 U.S.C. 405(g). After securing benefits on remand, each claimant applied for attorney's fees under EAJA, well in excess of 30 days after expiration of the time for appealing the remand orders. Purporting to distinguish *Melkonyan*, the Eighth Circuit held in *Welter* that the district court's orders in that case, though governed by sentence four of 42 U.S.C. 405(g), were not "final 'judgment[s] . . . modifying or reversing the decision[s] of the

Secretary' " within the meaning of that sentence; instead, the Eighth Circuit reasoned, "the district court retained jurisdiction of the claimants' cases and planned to enter dispositive sentence four judgments after the Secretary reevaluated the claimants' applications for benefits." Pet. App. 5a. "Because the parties did not report to the district court after the Secretary awarded benefits to the claimants" on remand, the Eighth Circuit concluded, "no final judgments ha[d] been entered," and the EAJA applications were still timely. *Id.* at 6a.[4]

The district court in the instant case determined that, under *Welter*'s analysis, "no final judgment ha[d] been entered" here as well, and that respondent's fee application therefore was timely. Pet. App. 12a. Proceeding to the merits of the application, the district court concluded that the position of the United States was not substantially justified, and it awarded respondent $1,372.50 in attorney's fees and $120 in costs under EAJA. *Id.* at 9a; see also *id.* at 17a-18a (magistrate's recommendation).[5]

[4] Although the Eighth Circuit held that the fee applications in *Welter* were timely, it affirmed the district court's finding in each case that the government's position was substantially justified. Pet. App. 6a-8a. Because the court of appeals' judgments therefore were in favor of the Secretary, we did not seek review of the timeliness issue in this Court.

[5] The district court also held that respondent's counsel was entitled under Section 206(b)(1) of the Social Security Act, 42 U.S.C. 406(b)(1), to an award of attorney's fees out of respondent's past-due benefits. See *Bowen* v. *Galbreath*, 485 U.S. 74, 76 (1988). The court awarded counsel $2,287.50 in fees under that provision, subject to counsel's refunding to respondent the amount of fees awarded against the government

3. The Secretary filed a notice of appeal and requested the court of appeals to consider the appeal en banc because *Welter* constituted binding circuit precedent on the timeliness issue. The court of appeals denied that motion. Thereafter, the panel, considering itself bound by *Welter*, held that respondent's fee application was timely, and it affirmed the district court's award of fees in an unpublished per curiam opinion dated April 17, 1992. Pet. App. 1a-2a.[6]

SUMMARY OF ARGUMENT

a. Under the express terms of 42 U.S.C. 405 and EAJA, as well as *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), and *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157, 2165 (1991), respondent's fee application was untimely. EAJA requires a fee application to be filed within 30 days of the "final judgment" in a civil action, which is defined to mean a "judgment" that is "final and not appealable." 28 U.S.C. 2412(d)(1)(B) and (2)(G). Under sentence four and sentence eight of 42 U.S.C. 405(g) and *Finkelstein*, the district court's April 4, 1989 order in this case, which reversed the Secretary's decision denying benefits and remanded

under EAJA ($1,372.50), as required by Section 3 of the 1985 amendments to EAJA (Pub. L. No. 99-80, § 3, 99 Stat. 186; 42 U.S.C. 406(b)(1)). See Pet. App. 9a; *id.* at 18a-24a (magistrate's recommendation). No question is presented here concerning the award of fees to counsel under 42 U.S.C. 406(b)(1), which were paid out of respondent's past-due benefits.

[6] In the court of appeals the Secretary did not challenge the district court's finding that the government's position was not substantially justified or its determination of the amount of the fees. We likewise have not presented those issues here.

for a rehearing, was an appealable "final judgment" under 28 U.S.C. 1291. That order became "not appealable" 60 days later (on June 3, 1989), when the time for taking an appeal under Fed. R. App. P. 4(a)(1) expired. Respondent's fee application, filed on July 18, 1990, was therefore more than a year out of time.

b. Contrary to the court of appeals' view, a district court cannot permit circumvention of the 30-day filing requirement by purporting to remand the case under sentence four without entering a final judgment, and instead retaining jurisdiction to enter a final judgment after proceedings on remand are completed. As 42 U.S.C. 405(g) makes clear (and as *Finkelstein* and *Melkonyan* confirm), a remand under sentence four is ancillary to—and must "accompany" and be entered "in conjunction with"—a "judgment," and sentence eight deems such a judgment to be "final." The district court accordingly has no authority to postpone entry of a "final judgment" when it remands to the Secretary in circumstances such as these.

c. This Court's decision in *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), does not justify a departure from the text of 42 U.S.C. 405(g) and EAJA. The Court in *Hudson* discussed the authority of a district court under 42 U.S.C. 405(g) to retain jurisdiction during the remand and to enter a post-remand judgment after the Secretary has made a further filing with the Court. *Hudson*, however, did not focus on the distinction between sentence four and sentence six remands. *Finkelstein* subsequently made clear that the statutory provisions on which *Hudson* relied in this discussion are confined to sentence six remands,

and *Melkonyan* similarly limits the implications of the *Hudson* opinion.

d. Nor is a departure from the text of 42 U.S.C. 405(g) and EAJA justified by the fact that, under established precedent, a claimant does not become a fully prevailing party following a sentence four remand unless he is awarded benefits on remand. The 30-day filing period begins to run when the time for appealing the remand order expires, but a definitive resolution of prevailing party status must await completion of proceedings on remand. In other words, securing a reversal of the Secretary's decision denying benefits and a remand to the Secretary is a necessary but not a sufficient condition for an award of fees; the remaining element for full prevailing party status, which is in the nature of a condition subsequent, is satisfied later if the claimant is awarded benefits. The filing rule required by the text of 42 U.S.C. 405(g) and EAJA therefore both respects established prevailing party jurisprudence and ensures the prompt filing of EAJA applications.

ARGUMENT

RESPONDENT'S APPLICATION FOR ATTORNEY'S FEES AND COSTS UNDER THE EQUAL ACCESS TO JUSTICE ACT WAS UNTIMELY

A. UNDER THE TERMS OF 42 U.S.C. 405(g) AND EAJA, AS WELL AS THIS COURT'S DECISIONS IN *FINKELSTEIN* AND *MELKONYAN*, RESPONDENT WAS REQUIRED TO FILE HIS APPLICATION WITHIN 30 DAYS AFTER EXPIRATION OF THE TIME FOR APPEALING THE APRIL 1989 REMAND

This case presents a single, straightforward question: Whether respondent's application for attorney's fees under the Equal Access to Justice Act (EAJA) was timely. Under the unambiguous terms of EAJA (28 U.S.C. 2412(d)(1)(B) and (2)(G)) and this Court's decisions in *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), and *Melkonyan* v. *Sullivan*, 111 S.Ct. 2157, 2165 (1991), respondent was required to file his fee application within 30 days of when the district court's April 4, 1989, remand order was no longer appealable. Respondent missed that deadline by more than a year.

1. In *Melkonyan*, this Court observed that *Finkelstein* identified two kinds of remands under 42 U.S.C. 405(g): "(1) remands pursuant to the fourth sentence, and (2) remands pursuant to the sixth sentence." *Melkonyan*, 111 S. Ct. at 2163 (citing *Finkelstein*, 496 U.S. at 624-627). Although in *Finkelstein* the Court "did not state explicitly * * * that these were the *only* kinds of remands permitted under the statute," 111 S. Ct. at 2164, it did so in *Melkonyan*. There, the Court held, in light of "Congress' explicit delineation in § 405(g) regarding

the circumstances under which remands are authorized," that Congress "intended to limit the district court's authority to enter remand orders to these two types." *Ibid.*

Sentence four of 42 U.S.C. 405(g) provides that the district court "shall have [the] power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." Thus, a remand pursuant to sentence four is ancillary to--and must "accompany" and be entered "in conjunction with"—a "judgment" affirming, modifying, or reversing the Secretary's decision on the merits. *Melkonyan*, 111 S. Ct. at 2165. Sentence eight in turn provides that such a judgment "shall be *final* except that it shall be subject to review in the same manner as a judgment in other civil actions" (emphasis added). Based on this explicit statutory text, the Court held in *Finkelstein* that an order entered pursuant to sentence four of 42 U.S.C. 405(g) is a "final judgment" and may be appealed as such pursuant to 28 U.S.C. 1291, even if it includes a remand of the cause to the Secretary for further proceedings. 496 U.S. at 625, 629. As the Court explained in *Finkelstein*, a sentence four remand order "terminate[s] the civil action challenging the Secretary's final determination that [the claimant] was not entitled to benefits," 496 U.S. at 624-625, and Section 405(g) does not require the Secretary to file anything further in the district court following completion of the administrative proceedings on remand, 496 U.S. at 625-627. Accordingly, if the Secretary's new decision on remand should again

deny the claimant's application for benefits, that decision will be subject to judicial review in a "separate piece of litigation" instituted by the claimant pursuant to 42 U.S.C. 405(g). 496 U.S. at 625.

A district court also has authority, in limited circumstances, to remand a case to the Secretary pursuant to sentence six of 42 U.S.C. 405(g). Under the first clause of sentence six, the court may, on motion of the Secretary made for good cause shown before he files his answer to the complaint, remand the case to the Secretary for further action; the court also may, at any time, order that additional evidence be taken before the Secretary, but only upon a showing that there is new and material evidence and that there is good cause for the failure to incorporate the evidence in the record in the prior administrative proceedings. Because a sentence six remand does not terminate the civil action challenging the Secretary's decision denying benefits—and because the district court therefore retains jurisdiction during the administrative proceedings on remand—the second clause of sentence six requires the Secretary to file with the court any additional or modified findings of fact or decision he renders on a sentence six remand (along with a supplemental transcript), so that the district court may then render its final sentence four judgment in the case. See *Finkelstein*, 496 U.S. at 627-628.[7]

[7] Sentence seven of 42 U.S.C. 405(g) provides that the "additional or modified findings of fact and decision" rendered on a sentence six remand "shall be reviewable only to the extent provided for review of the original findings of fact and decision."

2. It is undisputed in this case that the district court's April 1989 remand order was entered pursuant to sentence four of 42 U.S.C. 405(g). See, *e.g.*, Br. in Opp. 3, 7, 8. That order expressly "reversed" the Secretary's decision denying respondent's claim for benefits and remanded for further proceedings (*i.e.*, for a "rehearing" by the Secretary). Under EAJA, a fee application must be filed within 30 days of the "final judgment" in the civil action, which is defined to mean a "judgment" that is "final and not appealable." 28 U.S.C. 2412(d)(1)(B) and (2)(G). Under sentence eight of 42 U.S.C. 405(g) and *Finkelstein*, the district court's April 4, 1989, remand order under sentence four was an appealable "final" judgment.[8] That order became "not appealable" 60 days later (on June 3, 1989), when the time for taking an appeal under Fed. R. App. P. 4(a)(1) expired. Under the plain terms of 28 U.S.C. 2412(d)(1)(B), respondent then had

[8] This Court noted in *Finkelstein* that the order there was unquestionably a "judgment," because "it terminated the civil action challenging the Secretary's final determination that respondent was not entitled to benefits, set aside that determination, and finally decided that the Secretary could not follow his own regulations in considering the disability issue." 496 U.S. at 625. Similarly here, the district court's 1989 order terminated the civil action challenging the Secretary's final decision denying respondent's claim for benefits, "reversed" that decision, and finally decided that the ALJ had not properly evaluated respondent's allegations of pain or his back injuries and that the ALJ's assessment of respondent's ability to perform his past work was not supported by the medical evidence in the record as a whole. Pet. App. 26a-27a.

30 more days—until July 3, 1989—within which to file a fee application. *Melkonyan* removes any doubt about this statutory requirement, for it states that "[i]n sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165. It follows that the application respondent eventually filed on July 18, 1990, was more than a year out of time.[9]

B. THE DISTRICT COURT COULD NOT DEFEAT COMMENCEMENT OF EAJA'S 30-DAY FILING PERIOD BY PURPORTING TO RETAIN JURISDICTION TO ENTER A FINAL JUDGMENT AFTER COMPLETION OF THE ADMINISTRATIVE PROCEEDINGS ON REMAND

Despite the clarity of the relevant statutory provisions and decisions of this Court, the court of appeals held—affirming the district court's EAJA award on the basis of *Welter*—that the district court's 1989 order was *not* a final judgment. Pet. App. 2a. Instead, the court reasoned in *Welter* and this case that the district court "retained jurisdiction" for purposes of entering a final judgment after proceedings on remand were completed. *Id.* at 2a, 5a.

[9] It is irrelevant that the district court in this case did not label its April 1989 remand order a "final judgment." As the Court explained in *Finkelstein*, 496 U.S. at 628 n.7: "The label used by the District Court of course cannot control the order's appealability in this case, any more than it could when a district court labeled a non-appealable interlocutory order as a 'final judgment.' See *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976)."

Because the parties had not reported to the district court after the Secretary awarded benefits on remand, the Eighth Circuit further reasoned in *Welter* that no final judgment had yet been entered and that the fee application filed more than a year later was therefore still timely. Pet. App. 5a-6a, 12a.[10] This rationale not only permits a district court to evade Congress's decision to impose a 30-day filing requirement under EAJA, it also conflicts with the text of 42 U.S.C. 405(g) and with *Finkelstein* and *Melkonyan*.[11]

[10] In his brief in opposition (at 10), respondent sought to defend the Eighth Circuit's decision in this case on the same ground, arguing that "the district court's sentence-four *remand* did not constitute a sentence-four *judgment*, because the district court intended to retain jurisdiction and issue its judgment thereafter."

[11] There is no indication in this case (as there was none in *Welter*) that the district court actually intended to retain jurisdiction and to enter a final judgment after proceedings on remand were completed. See Pet. App. 27a. To the contrary, the district court's docket sheet shows that the case was closed following the remand. The Eighth Circuit instead has adopted an absolute rule that a district court *automatically* retains jurisdiction to enter a post-remand judgment in *any* case in which the district court remands to the Secretary pursuant to sentence four, except where the court itself finds the claimant entitled to benefits and remands with directions to pay benefits. See *Hafner* v. *Sullivan*, 972 F.2d 249, 252 (8th Cir. 1992). Indeed, it does not appear that an order of the latter sort even qualifies as a "remand" under sentence four, since it *forecloses* a "rehearing" of the merits by the Secretary. Accordingly, under the Eighth Circuit's rule, no sentence four remand order would ever be a "final judgment"—in direct contravention of *Finkelstein*.

There is no suggestion in 42 U.S.C. 405(g) that a district court may remand to the Secretary by "retaining" jurisdiction to enter its judgment only after completion of the administrative proceedings following the remand. To the contrary, as the text of 42 U.S.C. 405(g) makes clear (and as *Finkelstein* and *Melkonyan* confirm), a remand under sentence four must accompany and be entered in conjunction with a "judgment," and sentence eight deems such a judgment to be "final." 496 U.S. at 625, 629; 111 S. Ct. at 2164, 2165. The district court accordingly has no authority to postpone entry of a "final judgment" when it remands to the Secretary in circumstances such as these. The Court made that very point in *Finkelstein*, explaining (496 U.S. at 629):

> [T]he fourth sentence directs the entry of a final, appealable judgment even though that judgment may be accompanied by a remand order. The fourth sentence does not require the district court to choose between entering a final judgment and remanding; to the contrary, it specifically provides that a district court may enter judgment "with or without remanding the cause for a rehearing."

Nor is there any provision in 42 U.S.C. 405(g) for the Secretary to "report" to the district court following completion of proceedings on a sentence four remand, as the Eighth Circuit contemplated in *Welter*. See Pet. App. 6a. In this respect, sentence four stands in marked contrast to sentence six, which expressly directs the Secretary to file the revised findings and decision he renders on remand with the district court, so that the court may then enter its

final sentence four judgment after reviewing the revised findings and decision. See page 14, *supra*. The Court made clear in *Finkelstein* that this requirement of a post-remand filing by the Secretary applies only where the remand was pursuant to sentence six of 42 U.S.C. 405(g), and that no such requirement is imposed on the Secretary following a sentence four remand. 496 U.S. at 625-626.

The Court in *Finkelstein* also specifically rejected the argument (which was essentially adopted by the Eighth Circuit here and in *Welter*) that following a sentence four remand, "the district court may enter an appealable final judgment upon reviewing the Secretary's postremand 'additional or modified findings of fact and decision.'" 496 U.S. at 626 (quoting sentence seven of 42 U.S.C. 405(g)). The Court explained that "[t]he postremand review conducted by the District Court under the seventh sentence refers only to cases that were previously remanded under the sixth sentence." 496 U.S. at 626-627. Section 405(g) makes no provision for such a role by the district court following a remand made pursuant to sentence four.[12]

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[12] Respondent also relies (Br. in Opp. 10, 12) for the post-remand filing rule he urges on the requirement in Fed. R. Civ. P. 58 that a judgment be set forth on a separate document. But respondent did not argue below that the district court's April 4, 1989, order was not an appealable judgment because no separate document was issued at the time, and he therefore has waived that argument. Indeed, he waived that argument at least by the time he participated in the administrative proceedings contemplated by the remand order without insisting upon issuance of a separate document. Cf. *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978). In any event, a failure to

It was in light of this statutory scheme that the Court held in *Melkonyan* that "[i]n sentence six cases, the [EAJA] filing period does not begin until after postremand proceedings are completed, the Secretary returns to court, the court enters a final judgment, and the appeal period runs," but that in sentence four cases, the filing period begins immediately after the order that includes the remand is entered by the district court and the period for appealing that order has run, with no postponement for completion of the administrative proceedings on remand. 111 S. Ct. at 2165. The Eighth Circuit's decisions here and *Welter* obliterate this carefully drawn statutory distinction between sentence four and sentence six ~~rema~~nds.[13]

The correct approach to this issue, by contrast, is represented by the Fifth Circuit's decision in *Luna* v.

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comply with Rule 58 neither renders a judgment non-final nor deprives an appellate court of jurisdiction. *Bankers Trust*, 435 U.S. at 386 & n.7. Accordingly, and contrary to respondent's apparent view, Rule 58 does not grant a district court power to set aside the Secretary's decision and order a remand pursuant to sentence four, but to insulate that remand from appellate review—and to prevent commencement of the EAJA filing period—by withholding the formality of setting forth its judgment in a separate document.

[13] The First and Tenth Circuits have rendered decisions on the timelieness issue here that agree with the result reached by the Eighth Circuit in this case. See *Labrie* v. *Secretary of HHS*, No. 92-1066 (1st Cir. Sept. 30, 1992); *Gutierrez* v. *Sullivan*, 953 F.2d 579 (10th Cir. 1992), petition for cert. pending, No. 92-361. The issue also is raised in cases pending in the Sixth, Ninth and Eleventh Circuits. See *Iker* v. *Sullivan*, No. 92-5233 (6th Cir.); *Engelbrite* v. *Secretary of HHS*, No. 91-16920 (9th Cir.); *Newsome* v. *Sullivan*, No. 91-8917 (11th Cir.).

Department of HHS, 948 F.2d 169 (5th Cir. 1991). There, the court held, relying on *Finkelstein* and *Melkonyan*, that "*every* fourth-sentence remand order is a 'final judgment' * * * for purposes of the EAJA and section 405(g), and the EAJA's thirty-day time [begins] running at the point at which that final judgment [has] been entered and the period for appeal thereof [has] run." 948 F.2d at 171-172 (emphasis added); see also *Frizzell* v. *Sullivan*, 937 F.2d 254, 256-257 (5th Cir. 1991). The Fifth Circuit therefore held in *Luna* that the 30-day filing period began to run upon expiration of the period for appealing the remand order, even though the district court in that case (unlike the district court here, see note 11, *supra*) expressly purported to retain jurisdiction during the administrative proceedings on remand and directed the parties to file status reports with the court. See 948 F.2d at 171.[14]

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[14] The Fifth Circuit went on to hold in *Luna* that the 30-day filing period should be equitably tolled in the circumstances of that case, because the district court's remand order purported to retain jurisdiction, "thus unwittingly misleading Luna to think that no final judgment was being entered," and because the Secretary had apparently acquiesced in the form of the remand order. 948 F.2d at 173. The Fifth Circuit observed, however, that "[p]rospective claimants, cognizant of *Frizzel* and [*Luna*], presumably could not make the same equitable claim." 948 F.2d at 173 n.5.

Respondent did not make an equitable tolling argument in the court of appeals in this case, and he accordingly has waived that argument. Such an argument would be without merit in any event. In the first place, as the Eighth Circuit recognized in *Welter*, Pet. App. 5a, the 30-day filing period under EAJA is jurisdictional. A number of courts had so held prior to EAJA's amendment in 1985, see *Action on Smoking & Health* v. *CAB*,

C. A DEPARTURE FROM THE TEXT OF 42 U.S.C. 405(g) AND EAJA, AND FROM THE REQUIREMENTS OF *FINKELSTEIN* AND *MELKONYAN*, IS NOT JUSTIFIED BY THIS COURT'S PRIOR DECISION IN *HUDSON*

In attempting to defend the judgment below, respondent relied in his brief in opposition almost entirely on the discussion in *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), concerning the authority of a district court under 42 U.S.C. 405(g) to retain jurisdiction and enter a post-remand judgment. See Br. in Opp. 10-12. *Hudson*, however, did not distinguish between remands made pursuant to sentence four and those made pursuant to sentence six. See 490 U.S. at 884-888. This Court subsequently made clear in *Finkelstein* that the statutory provisions on which *Hudson* relied in discussing a district court's

724 F.2d 211, 225 (D.C. Cir. 1984); *Premachandra* v. *Mitts*, 753 F.2d 635, 642 n.10 (8th Cir. 1985); *Clifton* v. *Heckler*, 755 F.2d 1138, 1144-1145 (5th Cir. 1985), and the legislative history of the 1985 amendments shows that it was so understood. See, *e.g.*, S. Rep. No. 856, 98th Cong., 2d Sess. 16 (1984). The Fifth Circuit in *Luna* did not address the jurisdictional nature of EAJA itself. It instead rested its ruling on the fact that *substantive* claims under 42 U.S.C. 405(g) are subject to equitable tolling. See 948 F.2d at 173 (citing *Bowen* v. *City of New York*, 476 U.S. 467 (1985)). That is not a basis for tolling the distinct, government-wide filing deadline for fee applications under EAJA. But even if tolling might be permissible in some circumstances under EAJA, the predicates for the Fifth Circuit's ruling to that effect in *Luna* are lacking here: as we have pointed out (see note 11, *supra*), the district court's remand order in this case did not expressly purport to retain jurisdiction, and the Secretary did not acquiesce in any such order.

retention of jurisdiction and post-remand filings by the Secretary and post-remand judgments by the district court are confined to sentence six remands. 496 U.S. at 626-627. Indeed, the Court specifically declined to follow the language in *Hudson* that might have suggested that a sentence four remand order is not a final judgment. 496 U.S. at 629-631.

Similarly, in *Melkonyan*, the Court stated that there is only a "narrow class" of administrative proceedings that may be considered so intimately connected with the judicial proceedings as to be part of the "civil action" for purposes of an award of fees under EAJA, and it defined that class to consist of only those cases in which " 'a formal complaint within the jurisdiction of a court of law' *remains pending and depends for its resolution upon the outcome of the administrative proceedings.*" 111 S. Ct. at 2162 (quoting *Hudson*, 490 U.S. at 892). In cases remanded pursuant to sentence four, the complaint challenging the Secretary's decision denying benefits does not "remain[] pending" after the remand or "depend[] for its resolution upon the outcome of the administrative proceedings." To the contrary, the district court must enter a final judgment that disposes of the case (by reversing or modifying the Secretary's decision and remanding to the Secretary for further proceedings), and the Secretary's new decision on remand then "will be reviewable by a separate piece of litigation." *Finkelstein*, 496 U.S. at 625. The Court further explained in *Melkonyan* that *Hudson* "stands for the proposition that in those cases where the district court retains jurisdiction of the civil action and contemplates entering a final judgment following

the completion of administrative proceedings, a claimant may collect EAJA fees for work done at the administrative level." 111 S. Ct. at 2162. After *Hudson*, the Court held in *Finkelstein* that a district court has that authority only in cases remanded pursuant to sentence six. 496 U.S. at 625-627.

Consistent with this statutory scheme, the Court made clear in *Melkonyan* that "[i]n sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165. Respondent's reliance on *Hudson* in support of the quite different rule adopted by the Eighth Circuit is thus foreclosed by both *Finkelstein* and *Melkonyan*.

Against this background, respondent exaggerates considerably in asserting (Br. in Opp. 11) that *Finkelstein* and *Melkonyan* "specifically reaffirmed" *Hudson*. Both decisions pointedly limited the very implications of the *Hudson* opinion on which respondent relies here. As respondent points out (Br. in Opp. 10), it appears that if the Court in *Hudson* had focused upon the distinction between sentence four and sentence six remands that was central to the analysis in its subsequent decisions in *Finkelstein* and *Melkonyan*, the remand order in *Hudson* itself would have been classified as a sentence four remand. But *Hudson* did not identify the statutory distinction between sentence four and sentence six remands. Accordingly, in the wake of *Finkelstein* and *Melkonyan*, *Hudson* does not stand for the proposition that a district court may retain jurisdiction to enter a post-remand judgment—and thereby postpone

the EAJA filing period—in those cases that are remanded pursuant to sentence four. In short, *Finklelstein* and *Melkonyan* necessarily limit *Hudson* to cases remanded pursuant to sentence six.

D. THE COMMENCEMENT OF THE 30-DAY FILING PERIOD CANNOT BE AVOIDED ON THE GROUND THAT A CLAIMANT IS NOT FULLY A "PREVAILING PARTY" UNLESS HE IS AWARDED BENEFITS ON REMAND

1. The Eighth Circuit expressed the view in *Welter* that its holding that an EAJA application need not be filed until the administrative proceedings on remand have been completed was justified by the fact that "the claimants did not become prevailing parties eligible for attorney's fees until the Secretary reevaluated their cases and awarded them benefits." Pet. App. 6a (citing *Sullivan* v. *Hudson*, 490 U.S. at 887). The Eighth Circuit's underlying premise of when a claimant becomes a prevailing party was, of course, correct. This Court found it "clear" in *Hudson* that "a Social Security claimant would not, as a general matter, be a prevailing party within the meaning of the EAJA merely because a court had remanded the action to the agency for further proceedings," and noted that "the vast majority of the Courts of Appeals" had "come to this conclusion." 490 U.S. at 887;[15] accord, *Finkelstein*, 496 U.S. at 630; see

[15] See, *e.g.*, *McGill* v. *HHS*, 712 F.2d 28 (2d Cir. 1983), cert. denied, 465 U.S. 1068 (1984); *Brown* v. *HHS*, 747 F.2d 878, 883 (3d Cir. 1984); *Gamber* v. *Bowen*, 823 F.2d 242, 244 (8th Cir. 1987); *Swedberg* v. *Bowen*, 804 F.2d 432, 434 (8th Cir. 1986); *Escobar* v. *Bowen*, 857 F.2d 644 (9th Cir. 1988); *Paulson* v. *Bowen*, 836 F.2d 1249, 1252 (9th Cir. 1988).

also H.R. Rep. No. 120, 99th Cong., 1st Sess. 19 (1985) (report on 1985 amendments to EAJA)(noting that under EAJA case law, a claimant ordinarily was not regarded as a prevailing party solely by virtue of obtaining a remand to the Secretary). And even before *Hudson*, this Court had held that to be considered a prevailing party, the plaintiff must point to a resolution of the dispute that has changed the legal relationship between himself and the defendant. *Texas State Teachers Ass'n* v. *Garland Indep. School Dist.*, 489 U.S. 782, 792 (1989); *Hewitt* v. *Helms*, 482 U.S. 755, 760-761 (1987); see *Hudson*, 490 U.S. at 886-887.

However, the Eighth Circuit was wrong in *Welter* to believe that, in order to give effect to this established "prevailing party" jurisprudence, it was necessary to hold that an order under sentence four that contains a remand to the Secretary is not a "final judgment" that (after the time for appeal has expired) triggers EAJA's 30-day filing period. Pet. App. 6a. As we have explained, where a case is remanded pursuant to sentence four, the 30-day filing period under EAJA begins to run after the final judgment of remand is entered and the appeal period has run. But a definitive determination of prevailing party status must await completion of the proceedings on remand. As a result, a claimant would be entitled to EAJA fees only if he files a fee application within 30 days after the remand order is no longer appealable, the Secretary awards benefits on remand, and the district court finds that the government's position was not substantially justified.

Put another way, securing the reversal and remand from the district court is a necessary, but not a sufficient, condition for attaining full prevailing party status. That element must of course be satisfied when the claimant files his or her EAJA application. The remaining element (an award of benefits on remand)—which is, in essence, a condition subsequent—may be satisfied later. This interpretation of the statutory scheme is both reasonable and practicable; it is fully consistent with both 42 U.S.C. 405(g) and EAJA; and it properly gives effect to both *Melkonyan* and *Finkelstein* on the one hand and the prevailing party jurisprudence endorsed by *Hudson* and *Finkelstein* on the other.[16]

[16] Respondent contends (Br. in Opp. 15-18) that if a sentence four remand order is a final judgment that triggers EAJA's 30-day filing period, the claimant should be regarded as a prevailing party at that point, without regard to whether he ultimately recovers the benefits he seeks. This argument conflicts with the circuit precedent discussed above (see note 15, *supra*), and respondent cites holdings only by district courts in support of the new rule he proposes. In any event, it is not necessary for the Court to revisit that issue in this case. For even if respondent were correct that a claimant should be regarded as a prevailing party if the district court remands the case pursuant to sentence four, respondent's application still must be denied because he failed to satisfy the *threshold* requirement that he file his application within 30 days of when the remand order was no longer appealable.

When the amendments to EAJA were considered in 1984, the House bill would have deemed a Social Security claimant who obtained a remand under 42 U.S.C. 405(g) to be a "prevailing party," and would have required the claimant to file an EAJA application within 30 days of obtaining the remand order. H.R. 5479, 98th Cong., 2d Sess. § 2(a)(3) and

2. Respondent contends (Br. in Opp. 13) that under this rule, a claimant who seeks fees after a sentence four remand cannot satisfy the requirements of 28 U.S.C. 2412(d)(1)(B) that a party seeking fees under EAJA file an application "which shows that the party is a prevailing party" and "allege[s] that the position of the United States was not substantially justified." Respondent is wrong. The application can readily show that the claimant has satisifed the necessary element of prevailing party status to that point (that he has obtained from the court a reversal or modification of the Secretary's decision denying benefits and a remand for a rehearing), and can allege that the position of the United States was not substantially justified. If the claimant is then awarded benefits on remand, he will have satisfied the remaining element that is necessary for full prevailing party status.

(b)(3) (1984); see H.R. Rep. No. 992, 98th Cong., 2d Sess. 2-3, 12-13 (1984); 130 Cong. Rec. 29,276 (1984). The Senate version would have provided certain exceptions to the prevailing party rule in the House bill, with the result that a claimant who obtained a remand would not be regarded as a prevailing party if, *inter alia*, he did not thereafter prevail on remand (see § 2(a)(3), amending 28 U.S.C. 2412(d)(1)(B)); and under the Senate version, the claimant would have been permitted to file an EAJA application within 30 days of when he prevailed on remand (§ 2(b)(3), adding a new 28 U.S.C. 2412(d)(2)(H)(iii)). See 130 Cong. Rec. 30,151 (1984). The House and Senate could not reach agreement on statutory language to address remands in Social Security cases, *id.* at 30,152, 30,153-30,154, 31,406-31,407, and no such provisions were included in the 1985 EAJA amendments as finally passed.

The rule required by the text of 42 U.S.C. 405(g) and EAJA, and by *Finkelstein* and *Melkonyan*, makes practical sense as well. It clearly identifies the stage of the litigation at which the EAJA application must be filed, and it assures that applications are filed promptly, as EAJA's short 30-day filing period plainly contemplates. Thousands of Social Security cases are remanded to the Secretary each year,[17] and it is important to the sound and efficient administration of both the Social Security program and EAJA that there be clear rules for courts and litigants to follow regarding the filing and prompt disposition of EAJA applications.

By contrast, under the approach proposed by the court of appeals and respondent, an EAJA application need not be filed until after proceedings on remand have been completed, some "report" of undefined content has been filed with the district court (if the claimant prevails on remand), and the district court has entered a post-remand "judgment" on the basis of that report. See Pet. App. 6a. Nothing in 42 U.S.C. 405(g) or EAJA imposes any deadline for filing such a "report" with the district court, or even identifies which party would be responsible for doing so. As a result, disposition of the fee application could be greatly delayed.

[17] In 1989, the Appeals Council processed 6,432 remands. See Social Security Administration, *Annual Report to the Congress* 29 (Apr. 1990). In 1990, it processed 4,344 remands, Social Security Administration, *Annual Report to Congress* 34 (Apr. 1991), and in 1991, it processed 2,526. Social Security Administration, *Annual Report to Congress* 38 (Apr. 1992).

In short, neither established prevailing party precedents nor practical considerations justify a departure from the clear rule required by the plain language of 42 U.S.C. 405(g) and 28 U.S.C. 2412(d), and by this Court's construction of those statutory provisions in *Finkelstein* and *Melkonyan*. The Court accordingly should reaffirm that clear rule for the benefit of the hundreds of district judges and thousands of litigants annually who must consider the question of when an EAJA application must be filed if a Social Security case has been remanded to the Secretary pursuant to sentence four of 42 U.S.C. 405(g).[18]

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[18] Respondent argues (Br. in Opp. 7-8, 20-23) that if the Court holds that an EAJA application must be filed within 30 days of when a sentence four remand order becomes not appealable, that holding should be applied only prospectively. However, respondent did not make a non-retroactivity argument in the court of appeals, and there is no reason why this Court should consider it.

Nor does the issue warrant review by this Court. The non-retroactivity issue has not generated a circuit conflict; respondent cites (Br. in Opp. 22) only one court of appeals decision declining to apply *Melkonyan* retroactively— the Fourth Circuit's unpublished decision in *Sargent* v. *Sullivan*, 941 F.2d 1207 (4th Cir. 1991)(Table). Moreover, the only claimants who would have even a colorable argument in support of nonretroactivity would be those whose cases were remanded pursuant to sentence four of 42 U.S.C. 405(g) *prior* to *Melkonyan*, which expressly stated that an EAJA application must be filed within 30 days of when a sentence four remand becomes final and not appealable. The number of such claimants will diminish rapidly in the near future, since it has now been more than eighteen months since *Melkonyan* was decided. Finally, even if we assume arguendo that respondent's non-retroactivity argument is not entirely foreclosed (see Reply Br. 5-6 n.5 (petition stage))—especially since the filing deadline is jurisdictional, see note 14, *supra*; *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981)—resolution of that issue in a particular case might well depend on whether there was clear circuit precedent on the question at the time of the pre-*Melkonyan* sentence four remand. See *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-109 (1971); *St. Francis College* v. *Al-Khazraji*, 481 U.S. 604, 608-609 (1987). For the foregoing reasons, if the Court believes that the nonretroactivity issue might remain open in this case despite respondent's failure to raise it below, the appropriate course would be for the Court to remand the case to the court of appeals to consider that issue in the first instance. Compare *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 297-298 (1987).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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